



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY *P.H.*

**DATE:** April 19, 2006

**SUBJECT:** COMMENT: DRAFT AO 2006-09

Transmitted herewith is a timely submitted comment by Mr. Russell L. Smith on behalf of the American Institute of Certified Public Accountants and the American Institute of Certified Public Accountants PAC regarding the above-captioned matter.

Proposed Advisory Opinion 2006-09 is on the agenda for Thursday, April 20, 2006.

**Attachment**



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April 19, 2006

BY FACSIMILE

Ms. Mary Dove  
Secretary  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

RE: Draft Advisory Opinion 2006-9  
American Institute of Certified Public Accountants ("AICPA") and  
American Institute of Certified Public Accountants PAC ("AICPA PAC")

Dear Madame Secretary:

I am writing on behalf of AICPA and AICPA PAC ("the Requestors") to comment on Draft Advisory Opinion 2006-9 and, in particular, on Draft B which concludes that, under certain specified circumstances, AICPA PAC may attribute and report certain checks received from partnerships as contributions only by the individual contributing partners and not by the partnership itself. With regard to Draft A, the Requestors continue to believe that their situation parallels the various conditions under which individual contributions are not attributable to anyone except the contributor. However, the Requestors recognize that Draft A represents a strict interpretation of the law and regulations. In view of this interpretation, Requestors agree with the Commission's approach as posited in Draft B and respectfully urge the Commission to approve Draft B. The Requestors also seek the Commission's clarification as to the interpretation of the term "solicit" as used in Draft B.

**A. Use of an account "similar in all material respects" to that approved in Advisory Opinion 2005-20**

Draft B states that it would be permissible under current law and Commission regulations for a partnership to facilitate contributions by individual partners to the AICPA PAC without causing the partnership itself to be attributed with these contributions, if such facilitation takes the following form: partners would execute a form directing the partnership to deduct their individual voluntary contributions to the AICPA PAC from their respective compensation; the

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partnership would deduct the designated contributions from partner compensation at the time of disbursement; and the partnership would aggregate the individual partners' contributions into one check drawn only on an account containing the personal funds of the contributing partners and not on the partnership's operating account.

According to Draft B, one way to assure that a check represents only the personal funds of the contributing partners, and not partnership funds, would be for the check sent to the PAC by the partnership to be drawn on an account that is "similar in all material respects" to the separate automated electronic payroll account described in Advisory Opinion ("AO") 2005-20 and not on the partnership's operating account. In stating the facts in AO 2005-20, the Commission noted that the partnership each month transferred its entire payroll electronically from its operating account to a separate payroll account from which it was distributed electronically to accounts designated by each partner and employee. Partners choosing to receive their compensation through this automated electronic payroll system were required to designate at least one bank account into which a portion or all of their net compensation would be electronically deposited and could designate "any other accounts they choose, including those of charitable organizations" to which a portion of income distribution could also be transferred." (AO 2005-20 at 2). The Commission also stated that "because such transfers come from funds that are part of a . . . partner's income distribution, these . . . payments are made by the individual partner and not by [the partnership]" (*Id.*).

The Commission distinguished the separate automated payroll account from the partnership's operating account by noting that the partners who use the automated electronic payroll system "exercise complete control over the funds that represent their net compensation in [the] payroll account by designating recipients for such funds in [the] payroll system . . . . Significantly, [the partnership] has no control over the partner's choice of the recipient of any disbursement from [the] payroll account and at the moment a disbursement takes place from [the] payroll account, the funds being disbursed are the personal assets of the partner" (*Id.* at 3). The Commission also referred to a partner's designation of a recipient account through the automated electronic payroll system as "the functional equivalent of that partner writing a personal check" (*Id.*)<sup>1</sup>

The Requestors acknowledge that the facts upon which AO 2005-20 was based and those underlying the pending request differ in several respects. However, they believe that these differences should not pose an obstacle to the Commission's adoption of Draft B and that partnerships wishing to forward their partners' contributions to AICPA PAC in this manner should be able to accommodate the requirements specified in AO 2005-20.

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<sup>1</sup> By contrast, as discussed in Draft A, the Commission would regard any contribution drawn on a partnership's operating account as a contribution by the partnership, and therefore attributable to the partnership, because the Commission views the funds in a partnership's operating account as under the control of the partnership itself, and not subject to the control of the individual contributing partners (Draft A, p. 4, lines 3-7).

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**B. Comments on "payroll account" vs. "operating account"**

The partnership in AO 2005-20 proposed allowing partners to use the firm's automated electronic payroll account to designate the recipient of a political contribution and forward the contribution to the recipient. The request from AICPA and AICPA PAC addressed the proper attribution of contributions to AICPA PAC under circumstances where a partnership offers its partners the administrative convenience of aggregating their personal contributions and writing a single check on the partnership's operating account.

However, the Requestors recognize that the administrative convenience sought could be achieved through the use of an automated electronic payroll account that is separate from a partnership's operating account, that removes any suggestion of partnership control over partners' contribution decisions, and that allows partners to "exercise complete control over the funds that represent their net compensation" in the payroll account so that their political contributions are attributable only to each of them individually, and not to the partnership.

The Requestors are prepared to advise accounting firms organized as partnerships that, in order to avail themselves of the ability to forward contributions to the AICPA PAC, they must have automated electronic payroll systems that are similar or identical to the one described in AO 2005-20, or that could be designed to be "similar in all material respects" to that system. Firms having such systems and desiring to duplicate the "model" approved in AO 2005-20 would very likely be able to do so and thereby avoid the use of the partnership's operating account for transmitting contributions from individual partners to the AICPA PAC. Therefore, to the extent that contributing through such an automated electronic payroll account would make it more convenient for partners who are AICPA members to contribute to the PAC and encourage more widespread participation in the PAC, the goals of the Requestors in seeking an opinion from the Commission would be met through the Commission's adoption of Draft B.

**C. Comments on a partnership's relationship to the recipient PAC**

In addition, the partnership addressed by AO 2005-20 requested that Advisory Opinion in connection with partner contributions to the nonconnected committee sponsored by the partnership itself and not to any other political committee. The Requestors address contributions to AICPA PAC, the separate segregated fund of AICPA, an incorporated professional association for Certified Public Accountants ("CPAs").

As indicated in the request, three out of every four CPAs in the United States belong to the AICPA and many of these members practice their profession as members of partnerships. The AICPA believes it has a unique, albeit informal, relationship with those partnerships because of the high number of practicing accountants who belong to the AICPA. However, based on the principal rationale underlying the Commission's interpretation in AO 2005-20, the question of whether or not partnerships are members of the AICPA or sponsors of the AICPA PAC should not be an issue, nor an obstacle to the Commission's adoption of Draft B.

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The key points that the Commission made about the transfer of funds from a partner's payroll disbursement via the partnership's automated electronic payroll account were that, "at the moment a disbursement takes place [from the payroll account] the funds being disbursed are the personal assets of the partner" and that "when a partner designates a recipient account . . . it is the functional equivalent of that partner writing a personal check." Under such an interpretation, if partners are designating their own personal assets and, as the Commission noted, partners could designate as recipients of those personal assets not only the partnership's PAC, but also one or more other financial accounts, and "any other accounts they choose," including charitable organizations (AO 2005-20 at 2), there is no reason that the "functional equivalent" of a partner's personal check could not also be directed to another recipient to which a partner may lawfully give his or her money – the AICPA PAC – as proposed in Draft B, subject to the conditions stated therein.

Based on the foregoing discussion, the Requestors respectfully urge the Commission to adopt Draft B.

**D. Comment on contributions resulting from covering the costs of a permissible payroll system and clarification sought**

The Requestors note that Draft B also addresses the issue of the costs arising from the use of a partnership's separate payroll account to forward partners' personal contributions to AICPA PAC. Draft B provides that, when a partnership is lawfully permitted to contribute to the PAC, the partnership could absorb such costs itself (in which case a contribution attributable to the partnership would be made) or be reimbursed by AICPA PAC within a commercially reasonable time. When a partnership is not permitted to make federal political contributions, as in the case of a partnership that is a federal contractor, AICPA PAC would have to pay such a partnership in advance for the partnership's costs in connection with forwarding the contributions.

Draft B further notes that, "as the partnerships themselves are not members of AICPA, AICPA PAC may not solicit them" for contributions, but may "accept any contribution it receives from a partnership that is permitted by law to make contributions" (Draft B, p. 4, at footnote 1).

Therefore, it is the Requestors' understanding that AICPA PAC may receive an *unsolicited* contribution from such a partnership equal to cost incurred by the partnership in forwarding partners' contributions to the PAC pursuant to Draft B. The Requestors also assume that when a partnership, unsolicited, pays such costs out of partnership assets, the partnership must notify the AICPA PAC in writing that it has made an in-kind contribution to the PAC and instruct the PAC as to how such in-kind contribution should be attributed among the members of the partnership.

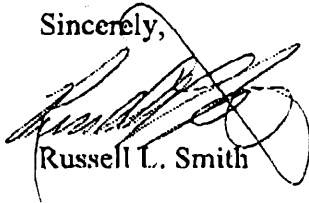
Alternatively, the Requestors assume that a partner may reimburse the partnership for the cost of forwarding contributions to AICPA PAC, in which case the partner would have made an in-kind contribution that the partner must report to the PAC.

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In addition, the Requestors assume – but seek confirmation by the Commission – that, if Draft B is adopted, the term “solicit,” as quoted above, would have the same meaning as in 11 C.F.R. 300.2(m), and that a “solicitation” would not include “merely providing information or guidance as to the requirement of a particular law,” as provided in that regulation. The Requestors also seek clarification that, if Draft B is adopted, it would be permissible for them to publicize the Advisory Opinion within the accounting community and provide factual information about the Opinion to accounting firms which are not AICPA members without such actions resulting in an unlawful “solicitation.”

On behalf of the AICPA and the AICPA PAC, I appreciate the opportunity to provide you with these comments. Please feel free to contact me if you have any questions.

Sincerely,



Russell L. Smith

